



Protecting Data-Driven Innovation under Merger Review and Abuse of Dominance: A Matter of Refurbishing Current Competition Law Concepts?

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Two-fold role of data



Input for
existing
services



Two-fold role of data

Input for
existing
services

Identifies
potential
trends and
changes in
consumer
interests

Current approach focuses on services offered

Search engines:

analysis of market for **online advertising** and market for **online search**

Microsoft/Yahoo merger and ongoing Google investigation

Social networks:

analysis of market for **online advertising** and potential markets for **communications apps or social networks**

Facebook/WhatsApp merger

Market for data?

Market definition requires existence of supply and demand

In online platforms, data is usually
'merely' used as input

2014 *Facebook/WhatsApp* merger: parties not active in any markets for provision of data or data analytics

Definition of a potential market for data in addition to existing relevant markets

Data also
affects
competition
for future
markets

Leads to a
more forward-
looking analysis
which better
reflects market
reality

Merger review

- Dissenting statement **FTC Commissioner Pamela Jones Harbour** in *Google/DoubleClick*
- No full analysis of data-related competition concerns in *Google/DoubleClick* and *Facebook/WhatsApp*
- *Google/Nest* merger in the US as an illustration

Abuse of dominance

- Using data to **enter related markets** and foreclose competition in those markets
- In essential facilities cases existence of **potential or hypothetical market** sufficient

Analogy with EU Horizontal Guidelines?

- Concept of ‘competition in innovation’
- Rely on R&D investments for assessing competition concerns
- If precise R&D efforts are unobservable, identify ‘specialised assets’ to which potential competitors need access
- Data as specialised asset?

Conclusion

There is a need to define a **potential market for data** even if it is not traded as a separate product

Ability but **so far no willingness** to go beyond narrow relevant product markets

Protection of data-driven innovation requires **more dynamic competition analysis**

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